

Exhibit B

DEPOSITION OF OFFICER MICHAEL CLARK

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

--o0o--

AG.G. a minor, by and through)
his guardian ad litem, JESSICA)
AQUINO; AR.G., a minor, by and)
through his guardian ad litem,)
JESSICA AQUINO; KARLA GONSALEZ)
individually; and AUGUSTIN)
GONSALEZ, JR., individually,)
)
)
Plaintiffs,)
)
)
vs.) CASE NO.: 4:19-cv-00697 DMR
)
CITY OF HAYWARD, a municipal)
corporation; MARK KOLLER,)
individually; PHILLIP WOOLEY,)
individually; MICHAEL CLARK,)
individually; TASHA DECOSTA,)
individually; and DOES 1-100,)
inclusive,)
)
Defendants.)
_____)

CERTIFIED COPY

DEPOSITION OF OFFICER MICHAEL CLARK

TUESDAY, JANUARY 28, 2020

REPORTED BY: ANGELICA R. GUTIERREZ, CSR NO. 13292

DEPOSITION OF OFFICER MICHAEL CLARK

1 stopped and similar commands, in totality constituted
2 the warning, correct?

3 A. Yes, exactly.

4 Q. Now, you have been trained in how to respond
5 to mentally impaired subjects, correct?

6 A. Yes, I have.

7 Q. And subjects who exhibit signs of mental
8 problems, correct?

9 A. Yes, I have.

10 Q. Okay. And you've also been trained in how to
11 respond to subjects who exhibit symptoms of suicide by
12 cop, correct?

13 A. Correct.

14 Q. Okay. And you have no training that says that
15 if a person is exhibiting signs of suicide by cop that
16 it's okay to then shoot them, correct.

17 A. I'm sorry. Can you repeat the question?

18 Q. You don't have any training that says if a
19 subject is exhibiting suicide by cop that it is okay to
20 then shoot them?

21 MR. VIGILIA: Objection, incomplete
22 hypothetical.

23 THE WITNESS: Scenarios change. Situations
24 change. Trainings -- it's all scenario-based and it's
25 subjective to that actual particular incident at the

DEPOSITION OF OFFICER MICHAEL CLARK

1 he supposes can be reduced or mitigated substantially
2 by stepping back that you should do that as opposed to
3 shooting the subject?

4 A. Objection. Lacks foundation, incomplete
5 hypothetical.

6 Q. If it's safe to do so, and it doesn't put the
7 lives of someone else in danger, then if that's a
8 possibility use to advantage to deescalate the
9 situation, I think that's a good practice to get into.

10 Q. Okay. Not just that it's a good practice,
11 you've been trained that you should do that, correct?
12 If it's reasonable?

13 A. If it's reasonable and, again, if no one's
14 life is in danger, there's no immediate threat to
15 somebody, and the situation allows for that, then yes,
16 it's a good thing to do.

17 Q. Okay. And you have been trained in
18 deescalation, correct?

19 A. Yes.

20 Q. You have been through the ACIT training?

21 A. I believe so, yes.

22 Q. Okay. Did you review that in preparation for
23 your deposition?

24 A. Just in talking with my attorney about things.
25 So.

DEPOSITION OF OFFICER MICHAEL CLARK

1 Q. Okay. And what was your first notification of
2 this incident?

3 A. There was a notification via dispatch with a
4 three tone beat. Three beat tone.

5 Q. Which means?

6 A. It's a sound that the radio makes when there's
7 a critical incident taking place.

8 Q. So this was considered a critical that you
9 were going to respond to?

10 A. It was by the -- it was broadcasted that way
11 by the tones, yes.

12 Q. Okay. And once you heard the tone, I take it
13 you paid closer attention?

14 A. Correct.

15 Q. And what was the substance of what you heard
16 next after you heard the tone?

17 A. That there was a man armed with a knife
18 threatening people?

19 Q. Okay. Are you familiar with the term
20 "swatting".

21 A. Swatting or squatting?

22 Q. Swatting.

23 A. Swatting?

24 Q. Yes.

25 A. Like, as in what reference?

DEPOSITION OF OFFICER MICHAEL CLARK

1 Q. You attached yourself to the call, correct?

2 A. Yes. Let -- let me redirect. I don't
3 remember if they gave a height or weight of the
4 suspect. I know they gave a vague description that he
5 was Hispanic and what he was wearing. I don't know if
6 they gave descriptors.

7 Q. Okay. So you put yourself on the call,
8 correct?

9 A. Yes.

10 Q. That means that dispatch didn't ask you to
11 respond. You did it -- you initiated your response?

12 A. That is correct.

13 Q. Okay. And did you receive further information
14 prior to when you arrived?

15 A. I received information that the location the
16 subject with the knife had changed from Orchard and
17 O'Neil to an address specifically on O'Neil.

18 Q. Okay. And you were familiar with the area?

19 A. I am.

20 Q. And is it a high-crime area?

21 A. It is.

22 Q. And did that heighten your sense of danger?

23 A. Yes.

24 Q. Why?

25 A. Because I -- because like you said, it's a

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1 A. Yes.

2 Q. And was likely on-scene if she was getting
3 flagged down?

4 A. That she was on-scene. I don't know she was
5 responding, but it made sense that she was on-scene, so
6 she was there.

7 Q. Okay. And you understood that Wooley was
8 getting flagged down as well, correct?

9 A. I believe someone was getting flagged down. I
10 know that both of them -- I believe one was getting
11 flagged down.

12 Q. Okay. And once you got onto O'Neil and drove,
13 you saw a police car that was parked on the side of the
14 road, correct?

15 A. In the middle of the road.

16 Q. Oh, in the middle of the road. Your interview
17 says -- after going northbound onto O'Neil, it says, "I
18 drove. I saw a police car parked along the side of the
19 road and an unintelligible was in it, and I got to
20 another police car, I believe was Officer Wooly's, and
21 I that's when I got out of the car, and I see Officer
22 Wooley off to my left, and I didn't see Sergeant
23 DeCosta. I don't know where she was at that particular
24 point. I knew she was there, but I didn't -- like, I
25 don't remember where she was in proximity to us." Is

DEPOSITION OF OFFICER MICHAEL CLARK

1 that an accurate reflection of your memory?

2 A. The car was offset. The car was off to the
3 side of the road for the most part, but still on the
4 road. It wasn't onto, like, closest to the curb or
5 sidewalk.

6 Q. Okay. Fair enough, but you understood that
7 Sergeant DeCosta and Officer Wooley were there,
8 correct?

9 A. I I knew that Officer Wooley was there. I
10 knew that Sergeant DeCosta was in the area. I don't
11 know where she was at.

12 A. Did you have an understanding that someone was
13 getting information -- gathering information about what
14 happened?

15 A. Someone as in who?

16 Q. One of the officers present.

17 A. We're all -- were all gathering information as
18 we got on-scene one way or the other.

19 Q. Okay. Did you review the -- the CAD on your
20 way over?

21 A. Did I or can I?

22 Q. Did you.

23 A. On the way to the call?

24 Q. Yes.

25 A. No, I didn't. I didn't -- I was striving.

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1 to put them in and annotate them into your detail.

2 Q. Okay. Up until point when shots were fired,
3 can you tell me what you had heard over the radio?

4 A. Sure. I got dispatched to a man that was
5 brandishing a knife and threatening people with a
6 knife. Hispanic male, blue jeans, and a red, possibly
7 black colored shirt at O'Neill and Orchard. I
8 continued to here that there was still an ongoing
9 situation, had not solved itself, meaning that there
10 was still a need for us to respond. As I got closer to
11 the scene, there was people -- I heard that there was
12 people -- I heard that there was updates of people
13 being flagged down, that the address had actually
14 changed to a physical address, or at least in front of
15 one, and that -- but at that time, I got out, I
16 ascertained the situation and made the decision, based
17 on my training and experience, what I perceived to be
18 my partner in immediate, bodily harm. And I feared for
19 his death and his safety, so therefore I made the
20 decision, which I'm trained to do, which I realized at
21 the time was a need for a lethal force situation.

22 Q. You never saw anything in mister -- when you
23 say -- strike that. When you say you got out and saw
24 your -- your fellow officer and you were in fear of his
25 safety, and you did what you were trained to do, what

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1 you mean is you started shooting, correct?

2 A. Not without --

3 MR. VIGILIA: Objection, argumentative.

4 MR. NISENBAUM: Q. Okay. What did -- what do
5 you mean? You said you did what you were trained to
6 do?

7 A. Sure. Based on the information that I had, I
8 saw a man who matched the description who was -- I
9 heard in the -- the seven seconds that this whole event
10 unraveled, unfolded, there were -- I heard commands
11 that my partner was giving, which I believe to be a
12 warning and a command at the same time because, as I
13 mentioned earlier, requesting someone and showing the
14 gun -- pointing a gun at someone and telling them to
15 stop is as much an equal warning as it is a command.
16 And he was directly making pre-threat indicators
17 towards my partner as he walked towards him, and I
18 believed he was armed with a knife, so therefore,
19 because my partner's life was in jeopardy, I discharged
20 my firearm to stop the threat.

21 Q. And so you shot him?

22 A. I did.

23 Q. Okay. How many times?

24 A. Three? Two or three. Somewhere around there.

25 Q. And at the time that you shot him, you saw

DEPOSITION OF OFFICER MICHAEL CLARK

1 A. There's no such thing as "well-lit" in the
2 dark, whether you have lights or not.

3 Q. So your --

4 A. You're well-lit. You are well-lit, but if we
5 take the light out of this room and it's dark outside
6 and I put a flashlight on you, a spotlight, or
7 headlights on you, you're -- I can see you. Doesn't
8 mean you're well-lit.

9 Q. Could you see his hands?

10 A. I could see his hands.

11 Q. Was there any objects in his hands?

12 A. I didn't see any objects in his hands, but he
13 was presenting his hands in a way as if he had
14 something --

15 Q. Show me how he was presenting them.

16 A. Something along the lines of this.

17 Q. Please stand and show me. He wasn't sitting,
18 was he?

19 A. He wasn't sitting. So, he had his hands out,
20 for the court purposes.

21 Q. You're holding your hands together, you're
22 collapsing -- and I take it you have the correct hands,
23 if you can recall?

24 A. It wouldn't really matter to know which hands.
25 Either way --

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1 Q. Okay. I just want to know how accurate your
2 memory is.

3 A. All I know is he had his hands where one hand
4 was over the other. I don't think it really matters.
5 It was presented this way like he was holding
6 something.

7 Q. And so, his hands were in front of him.

8 A. Correct.

9 Q. Keep standing. Keep standing. I need to
10 describe it for the record. I didn't tell you that at
11 the beginning, but when we make gestures, we have to
12 describe them for the record.

13 A. I understand.

14 Q. Okay. So, you're collapsing one hand
15 underneath the other. You're about belly button in
16 height?

17 A. That's correct.

18 Q. Okay. And your hands are together in front of
19 you, your elbows are bent, correct?

20 A. Something of this nature, yes.

21 Q. And you have one hand collapsing the other
22 hand that's on top of it, and the top hand is a thumb
23 out, correct? As opposed to the inside?

24 A. I'm telling you what I believe to have
25 observed. I'm not saying that it was exactly like

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1 this. I'm saying that he was -- had his hands one way
2 or the other, this, this, but in a threatening
3 manner --

4 Q. To be clear --

5 A. -- towards --

6 Q. To be clear, what you are saying is that his
7 hands looked as if, like, his fingers were curled up --
8 in one of his hands, his fingers were curled up as if
9 he was grasping something, correct?

10 A. Correct. I'm saying it look like he was
11 holding something in his hands --

12 Q. Okay.

13 A. -- and pointing it towards somebody.

14 Q. And so, if there were an object protruding
15 from his hand, it would be protruding on the outside
16 from the thumb, correct? Away from the body from the
17 thumb, correct? The thumb and forefinger?

18 MR. VIGILIA: Objection. Calls for
19 speculation.

20 MR. NISENBAUM: Q. Just the way that you're
21 holding it?

22 A. Could have been held in any way. If it's not
23 in front of him -- if the knife -- if the blade is
24 pointing towards him or towards -- it doesn't matter to
25 me. It's all the same. It's just equally as

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1 Q. Later you found out?

2 A. Later I found out I did.

3 Q. Right. And you found out -- well, strike
4 that. You didn't hear her say anything along the lines
5 of, "wait, he's threatening"?

6 A. I don't recall that, no.

7 Q. Okay. Did you know that she had been
8 gathering information at the scene?

9 A. No, I did not.

10 Q. Okay.

11 A. Well, I knew that she, just like all of us,
12 had been gathering information, so I don't know if she
13 was gathering specific information.

14 Q. Well, we knew she was gathering some specific
15 information, because she gave the address, correct?

16 A. Correct.

17 Q. Okay. And what did you do to gather
18 information?

19 A. I listened to the radio broadcast. I looked
20 at where my partner's cars parked. I monitored the
21 situation via -- like I said, via radio. I factored
22 formulas and plans on how to deal with the situation,
23 whatever it may be. Big, little, or indifferent. Then
24 formulated a game plan on how to deal with the
25 situation.

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1 A. Did any of those game plans consider the use
2 of the taser?

3 A. That's also a possibility.

4 Q. So did you formulate a specific game plan that
5 included the use of the taser?

6 A. It crossed my mind that there's a number of
7 options that I could have used, yes.

8 Q. Okay. And you knew that Officer Wooley had
9 him at gunpoint, correct?

10 A. I was already out of my car by the time
11 Officer Wooley had him at gunpoint.

12 Q. Okay. And you know that Officer Wooley had a
13 taser, correct?

14 A. Correct.

15 Q. You had a taser. Nobody mentioned taser ever,
16 correct?

17 A. There was no time to.

18 Q. Okay. The question, nobody mentioned taser
19 ever, correct?

20 A. No. No, specifically because there was no
21 time to.

22 Q. Okay. Is this one of those rare situations
23 where there is almost never no time? That this time is
24 one them?

25 A. This is a very fast situation. It happened in

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1 seven seconds, but I still believe that you can
2 formulate a game plan, and you can formulate tactics,
3 and you can think about all these things. The
4 application of which was not there, because there was
5 no time to do so. There was one specific way to handle
6 this, unfortunately, and it was the way had -- it was
7 handled.

8 Q. Did you see anything that blocked Officer
9 Wooley from moving backwards?

10 A. There -- I don't know -- I didn't know
11 anything at the time. I didn't see anything at the
12 time, but that's not say there wasn't. I wasn't really
13 focused on what was behind Officer Wooley at the time.

14 Q. And was Mr. Gonzales -- we've already
15 discussed he wasn't charging at Officer Wooley,
16 correct?

17 A. I would say he was.

18 Q. So walking towards Officer Wooley is charging
19 at him?

20 A. In this situation yes.

21 Q. Okay. What is your definition of charge?

22 A. When given commands to stop and you continue
23 in a -- in a way that is threatening, that would be
24 charging.

25 Q. So, walking at -- with a methodical -- at a

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1 officers believe. Lacks foundation.

2 A. To answer your question, I -- I can't, you
3 know, say what other officers would do. I can say that
4 it's -- you should not drink a gallon of whiskey, but
5 that doesn't mean can't do it if you really wanted to.
6 That's the metaphor. Perhaps a poor one, but that's
7 the point I'm trying convey.

8 Q. That's a pretty poor metaphor.

9 A. But I think it's the point that I'm trying to
10 convey that should be taken out of that, not the
11 metaphor itself.

12 Q. Got it. I think I understand the metaphor.
13 Thank you. Now, you heard Officer Wooley, before shots
14 were fired, saying, "Put down the knife. Put down the
15 knife", correct?

16 A. Correct.

17 Q. Okay. And you never saw Sergeant DeCosta at
18 the scene until after shots were fired, correct?

19 A. That is correct.

20 Q. And how far were you from Mr. Gonzales when
21 you shot him?

22 A. Between 12 to 15 feet.

23 Q. Okay. And you were approaching him?

24 A. I was.

25 Q. Okay. As you shot, were you walking?

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1 A. I was -- I was running.

2 Q. Okay. You were running and shooting?

3 A. I was running to him, and when I saw him, I
4 stopped.

5 Q. Okay. Did you start shooting after you
6 stopped?

7 A. Yes.

8 Q. Okay. And how long did it take you to fire
9 your shots?

10 A. From the minute I exited my car, I -- I put my
11 first foot on the ground, and after the shots were --
12 after the shots were fired, I believe it was somewhere
13 around seven seconds.

14 Q. Okay. And you don't -- you have no idea
15 whether or not Officer Wooley shot before you did,
16 correct?

17 A. I -- I don't know.

18 Q. And you don't recall hearing any of Officer
19 Woolly's shots after you stopped firing, correct?

20 A. I remember hearing Officer Wooley shoot. I
21 don't remember chronologically in which order it came,
22 before or after.

23 Q. And so, you would be shooting at
24 Mr. Gonzalez's right side, correct?

25 A. I believe it would be his left side.

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1 Q. His left side? Okay. And did you believe
2 that you were about the same distance from Officer
3 Wooley as you were from Mr. Gonzales when you shot him?

4 A. In close proximity. About the same distance.

5 Q. Okay. Were you closer -- you were in a
6 straight line. Were you closer to Mr. Gonzales than to
7 Officer Wooley?

8 A. I would say I was probably slightly closer to
9 Officer Wooley, maybe. Not by much, though. Maybe a
10 foot or two.

11 Q. So how long after you heard Officer Wooley
12 say, "put the knife down", did you -- the last time you
13 heard him say it did you fire?

14 A. I heard him saying it as I was approaching
15 Mr. Gonzalez.

16 Q. I understand that. How long after you last
17 heard him say, "put the knife down" did you fire?

18 A. Split second.

19 Q. Was he still saying that when you fired?

20 A. I don't recall.

21 Q. Okay. And last thing I want to do is watch
22 the video. I want to make sure that I don't have any
23 other questions here. Did you hear Officer Wooley say,
24 "put the knife down" or "he's got the knife"?

25 A. I believe I heard both.

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1 Q. Okay. And how far -- in your demonstration
 2 how far, were Mr. Gonzalez's away from his body? Like
 3 from his abdomen, from what you could tell?

4 A. Based on what I recall, they were extended in
 5 front of his body. I don't know if it was tucked up
 6 under his body or out. I couldn't give you a
 7 definitive answer. They were in front of his body.

8 Q. So if they were out, they were out a few
 9 inches?

10 A. I don't -- I -- they were out in front of his
 11 body. I don't know how far they were approximately in
 12 front of his stomach, for example.

13 Q. In other words, his elbows weren't locked --
 14 in a locked out position, correct?

15 A. They could have been. I don't recall.

16 Q. Okay. And your life was not threatened,
 17 correct?

18 A. I did not feel like mine was at the time,
 19 doesn't mean it wasn't. Within the proximity he was to
 20 me, he was actually closer to me than he was Officer
 21 Wooley. I felt and perceived that the threat was on
 22 Officer Wooley at the time. Doesn't mean he couldn't
 23 have turned it on me.

24 Q. I'm sorry, how far was he from Officer Wooley?

25 A. I'd say he was probably, maybe, 15 feet.

DEPOSITION OF OFFICER MICHAEL CLARK

1 Q. When you fired?

2 A. Yes.

3 Q. Okay. And how far from you was he when you
4 fired?

5 A. 10 to 12 feet.

6 Q. Okay.

7 A. 12 to 14, 15, somewhere around there. Not
8 very far.

9 Q. Now, you told interviewers that you saw a box
10 cutter directly underneath Mr. Gonzalez; do you recall
11 that?

12 A. I do.

13 Q. By box cutter you're referring to the razor
14 blade?

15 A. It was brought to my attention that it was
16 just a razor blade.

17 Q. Okay. Why did you say "box cutter"?

18 A. 'Cause it looked like a box cutter when it --
19 when it was all said and done. Because of the
20 situation, adrenaline perhaps. You never know. It was
21 just something that -- it looked like to me like it was
22 a box cutter.

23 Q. So a box cutter, you know the difference
24 between a box cutter and razor blade, right?

25 A. I do.

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1 question? Am I talking about what I'm observing in
2 this video, or you asking what I recall from -- at the
3 time and looking in hindsight as to this video --

4 Q. Good question. I'll try to make the clear in
5 my questions, but you recall that you were present at
6 this point in time, correct? Or were you present yet?

7 A. Actually on scene?

8 Q. Yes.

9 A. Yes, I was.

10 Q. Did you see this at this very point in time?

11 A. I saw him at this point coming towards Officer
12 Wooley, yes.

13 Q. Okay. What did he do? What did he do?

14 MR. VIGILIA: Objection. Vague,
15 argumentative.

16 MR. NISENBAUM: Q. What did he do that caused
17 you to do that?

18 A. It's what he could have done.

19 Q. What he could have done?

20 A. Yes.

21 Q. He's not walking fast, right? Is he walking
22 fast?

23 A. He's walking -- he's not walking fast. He's
24 walking deliberately.

25 Q. Deliberately, okay. He's walking slowly

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1 DECLARATION OF WITNESS
2

3 I hereby declare I am the deponent in the
4 within matter; that I have read the foregoing deposition
5 and know the contents thereof, and I declare that the
6 same is true of my knowledge except as to the matters
7 which are therein stated upon my information or belief,
8 and as to those matters, I believe them to be true.

9 I declare under the penalties of perjury of the
10 State of California that the foregoing is true and
11 correct.

12
13 Executed this _____ day of _____,
14 20____, at _____, _____.
15 (City) (State)

16
17 MICHAEL CLARK

21
22
23
24
25

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DEPOSITION OF OFFICER MICHAEL CLARK

1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF CONTRA COSTA)

4 I, Angelica R. Gutierrez, a licensed Certified
5 Shorthand Reporter, duly qualified and certified as such
6 by the State of California;

7 That prior to being examined, the witness named in
8 the foregoing deposition was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but the truth;

10 That the deposition was by me recorded
11 stenographically at the time and place first herein
12 mentioned, and the foregoing pages constitute a full,
13 true, complete and correct record of the testimony given
14 by the said witness;

15 That I am a disinterested person, not being in any
16 way interested in the outcome of said action, nor
17 connected with, nor related to any of the parties in said
18 action, or to their respective counsel, in any manner
19 whatsoever.

20

21 DATED: January 28, 2020

22

23 _____/s/Angelica R. Gutierrez_____

24 ANGELICA R. GUTIERREZ, CSR No. 13292

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DEPOSITION OF OFFICER MICHAEL CLARK

1 WITNESS LETTER

2 TO: Officer Michael Clark Date: 03.06.20
c/o Michael G. Vigilia, Sr. Asst. City Attorney
3 CITY OF HAYWARD Depo: 01.28.20
777 B Street Ref. #20012804A
4 Hayward, CA 94541

5 RE: AG.G...J.Aquino; K.Gonsalez v. City of Hayward, et al.

6 Dear Officer Clark:

7 Please be advised that the transcript of your
deposition taken in the above matter has been completed
8 and is now available at this office for your reading and
signing.

9 Please contact our office between the hours of 9:30
a.m. and 5:00 p.m. Monday-Friday, to schedule an
10 appointment. Or, if you prefer, contact the attorney to
review and sign the copy of your deposition under penalty
11 of perjury.

12 Read the transcript making any changes necessary.
In making any changes, please use the following guide:

- 13 1. DO NOT WRITE on the original transcript.
- 14 2. SIGN UNDER PENALTY OF PERJURY at the end of the
Deposition on the Certificate of Witness Page.
- 15 3. List each change on the Deposition Errata Sheet
following this page. Signature is required at
the bottom of the Errata Sheet.
- 16 4. Forward the signed Certificate of Witness Page
and signed Errata Sheet in addition to a copy of
this letter to:

17 Barbara J. Butler & Associates
Certified Court Reporters
18 P.O. Box 3508, Santa Clara, CA 95055
(510) 832-8853 or (408) 248-2885.

19 Upon receipt of items requested in this letter, I
will forward copies of same to all Counsel.

20 In the event you have not reviewed your deposition
within 35 days or by trial date, whichever is sooner, the
21 original transcript will be sealed pursuant to applicable
laws and thereafter mailed to the deposing attorney.

22 Sincerely,

23 /s/Barbara J. Butler
24 Barbara J. Butler, CSR

25 cc: All Counsel

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